

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

**FIRST ACT, INC.,**

**Plaintiff,**

**v.**

**KIDZ TOYZ, INC. and  
CHRISTMAS TREE SHOPS, INC.,**

**Defendant.**

**Civil Action No. 03-12507 EFH**

**ANSWER OF DEFENDANT KIDZ TOYZ, INC.**

For its Answer and Affirmative Defenses to the Complaint and Jury Demand (hereinafter, the "Complaint") of plaintiff First Act Inc. ("First Act"), defendant Kidz Toyz, Inc. ("Kidz Toyz") by and through its undersigned attorneys, allege:

1. Kidz Toyz admits that by filing the Complaint, First Act is asserting causes of action for trade dress infringement, palming off, and unfair competition. Kidz Toyz lacks knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 1, and therefore denies the same.

2. Kidz Toyz admits that CTS purchased from Kidz Toyz a boxed set of musical instruments labeled "4 Piece Musical Set" containing a tambourine, a triangle, and two jingle sticks. Kidz Toyz lacks knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 2, and therefore denies the same.

3. Kidz Toyz lacks knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 3, and therefore denies the same.

4. Kidz Toyz lacks knowledge or information sufficient to form a belief as to all allegations in paragraph 4, and therefore denies the same.

5. Kidz Toyz admits that it is a New York corporation located at 222 Mamaroneck Avenue, Suite 207A, White Plains, New York 10605. Kidz Toyz admits that it sells musical instruments for children. Kidz Toyz denies the remaining allegations in paragraph 5.

6. Kidz Toyz lacks knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 6, and therefore denies the same

7. Kidz Toyz admits that the Complaint purports to assert claims for trade dress infringement and unfair competition under the Lanham Act, and for state and common law claims, and that this Court has subject matter jurisdiction over the purported claims.

8. Kidz Toyz denies that venue is proper in this District and therefore denies all allegations in paragraph 8 of the Complaint.

9. Kidz Toyz admits that the Junior Quartet boxed set consists of four musical instruments, but denies all other allegations in paragraph 9 of the Complaint.

10. Denied.

11. Kidz Toyz admits that Exhibit A to the Complaint is a photograph showing First Act's Junior Quartet product. Kidz Toyz denies the remaining allegations in paragraph 11 of the Complaint.

12. Kidz Toyz denies that the design of the Junior Quartet boxed set is distinctive and that it has acquired secondary meaning in the marketplace. Kidz Toyz lacks sufficient knowledge or belief to admit or deny the remaining allegations in paragraph 12, and therefore deny the same.

13. Kidz Toyz lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 13, and therefore denies the same.

14. Kidz Toyz lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 14, and therefore denies the same.

15. Kidz Toyz lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 15, and therefore denies the same.

16. Kidz Toyz admits that CTS bought a 4-piece boxed set from Kidz Toyz, that the boxed sets were made in China and imported into this Country. Kidz Toyz denies the remaining allegations of paragraph 16.

17. Kidz Toyz admits that the photograph shown in Exhibit B to the Complaint shows Kidz Toyz' 4-Piece Musical Set. Kidz Toyz lacks knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 17, and therefore denies the same.

18. Kidz Toyz admits that the photographs shown in Exhibit C to the Complaint are side by side photographs of First Act's Junior Quartet product and Kidz Toyz' 4-Piece Musical Set. Kidz Toyz denies the remaining allegations of paragraph 18.

19. Denied.

20. Kidz Toyz incorporates by reference herein each of the foregoing responses.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Kidz Toyz incorporates by reference herein each of the foregoing responses.
28. Denied.
29. Denied.
30. Denied.
31. Denied.
32. Denied.
33. Denied.
34. Kidz Toyz incorporate by reference herein each of the foregoing responses.
35. Admitted.
36. Denied.
37. Denied.
38. Denied.
39. Kidz Toyz incorporate by reference herein each of the foregoing responses.
40. Kidz Toyz lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 40, and therefore denies the same.
41. Denied.
42. Denied.
43. Denied.
44. Kidz Toyz incorporates by reference herein each of the foregoing responses.
45. Denied.
46. Denied.
47. Denied.
48. Kidz Toyz incorporates by reference herein each of the foregoing responses.

49. Denied.
50. Denied.
51. Denied.
52. Kidz Toyz incorporates by reference herein each of the foregoing responses.
53. Denied.
54. Denied.
55. Denied.
56. Kidz Toyz incorporates by reference herein each of the foregoing responses.
57. Denied.
58. Denied.
59. Denied.
60. Denied.
61. Kidz Toyz incorporates by reference herein each of the foregoing responses.
62. Admitted.
63. Denied.
64. Denied.
65. Denied.
66. Denied.
67. Kidz Toyz incorporates by reference herein each of the foregoing responses.
68. Denied.
69. Denied.
70. Denied.
71. Denied.

72. Kidz Toyz incorporates by reference herein each of the foregoing responses.

73. Kidz Toyz lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 73, and therefore denies the same.

74. Denied.

75. Denied.

76. Denied.

77. Denied.

#### KIDZ TOYZ' AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

2. The packaging and product configuration of First Act's Junior Quartet boxed set, including each individual instrument, are not distinctive and have not acquired secondary meaning in the marketplace.

3. The sale of Kidz Toyz' 4-Piece Musical Set did not require permission from First Act.

4. Neither Kidz Toyz nor CTS have infringed and are infringing any trade dress rights of First Act, including any asserted trade dress rights in First Act's Junior Quartet boxed set, under the Lanham Act or under the Massachusetts common law.

5. Neither Kidz Toyz nor CTS have palmed off or are palming off the trade dress of First Act's Junior Quartet boxed set.

6. Neither Kidz Toyz nor CTS have intentionally interfered with any business relationships between First Act and CTS.

7. Neither Kidz Toyz nor CTS have unfairly competed with First Act in violation of Massachusetts common law or the Lanham Act.

8. Neither Kidz Toyz nor CTS have engaged in unfair or deceptive trade practices.

9. First Act is barred from recovery and from equitable relief by the doctrines of laches and estoppel.

10. First Act's claims are barred as all actions taken by Kidz Toyz were for legitimate business purposes.

11. First Act's claims are barred as Kidz Toyz' actions were neither wrongful nor improper.

12. Neither Kidz Toyz nor CTS are subject to personal jurisdiction in this District, and venue is not properly laid in this District.

13. First Act has violated Fed.R.Civ.P. 11 by prosecuting claims that are groundless, wholly insubstantial, and frivolous.

#### DEMAND FOR JURY

Kidz Toyz demands a trial by jury in this action for all issues properly triable by a jury.

WHEREFORE, Kidz Toyz prays for judgment and relief as follows:

1. That the Complaint be dismissed with prejudice, and that First Act take nothing by way of its Complaint;

2. That neither Kidz Toyz nor CTS have infringed and are infringing any trade dress rights of First Act, including any asserted trade dress rights in First Act's Junior Quartet boxed set, under the Lanham Act or under the Massachusetts common law.

3. That neither Kidz Toyz nor CTS have palmed off or are palming off the trade dress of First Act's Junior Quartet boxed set.

4. That neither Kidz Toyz nor CTS have intentionally interfered with any business relationships between First Act and CTS.

5. That neither Kidz Toyz nor CTS have unfairly competed with First Act in violation of Massachusetts common law or the Lanham Act.

6. That neither Kidz Toyz nor CTS have engaged in unfair or deceptive trade practices.


7. That First Act is barred from recovery and from equitable relief by the doctrines of laches and estoppel.

8. That First Act be ordered to pay Kidz Toyz' attorney's fees and costs in accordance with 35 U.S.C. §285; and

9. That Kidz Toyz be granted such other and further relief as the Court deems just and proper.

Respectfully Submitted,  
NIXON PEABODY LLP

Dated: February 23, 2004



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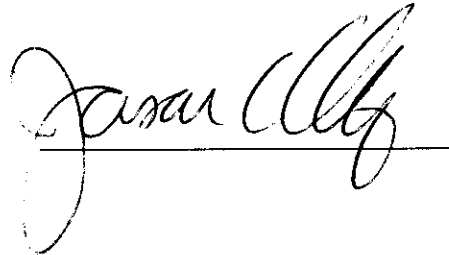


**CERTIFICATE OF SERVICE**

I hereby certify that, on February 23, 2004, a true copy of the foregoing ANSWER OF KIDZ TOYZ KIDZ TOYZ INC. AND CHRISTMAS TREE SHOPS, INC. was served by first-class mail and electronic mail upon:

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*Attorneys for Plaintiff  
First Act, Inc.*

A handwritten signature in cursive script, appearing to read "Jason Alt", is written over a horizontal line.